U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LUIS VELEZ and DEPARTMENT OF VETERANS AFFAIRS, JAMES A HALEY VETERANS ADMINISTRATION HOSPITAL, Tampa, FL

Docket No. 98-1197; Submitted on the Record;
Issued December 7, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether appellant has established that he sustained an emotional condition in the performance of duty as alleged; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review.

On May 15, 1995 appellant, then a 44-year-old medical clerk, filed a claim for stress, weakness and hypertension beginning in 1992, which he attributed to "discrimination and retaliation" at work. Appellant alleged that he was falsely accused of poor job performance, experienced unspecified periods of pressure at work and was subject to harassment and discrimination based on race and national origin.[1] The record indicates that appellant had a previous emotional condition claim denied regarding alleged discrimination at work prior to June 4, 1993.[2]

In an August 18, 1995 statement, Ms. Brenda L. Almon, appellant's supervisor since May 15, 1995, noted that his duties as a computer assistant since November 1993 involved paying routine bills on three accounts which did "not vary from month to month," and that appellant was fully trained to perform the duties of his position. However, on investigation, appellant was "not performing all the duties in his position description," spending "most of his time paying bills," while his coclerk did troubleshooting. Ms. Almon met with appellant on April 27, 1995 to arrange training "in those areas where he was not proficient." After such training, appellant would be expected to "set up authorizations, work up bills to be paid and troubleshoot" any related problems. Ms. Almon recalled that appellant mentioned job stress and

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[1] In July 10, 1995 letters, the Office advised appellant and the employing establishment to provide a detailed description of the alleged work factors, including incident dates, witness statements and corroborating documentation.

[2] Claim No. A6-572120.

interpersonal conflicts with coworkers. On May 3, 1995 she offered him a position as a records preparation clerk at the same grade and pay. She described the position as "very low key, does not involve dealing with phone calls, other employees, or the public." Appellant refused the offer, alleging that it was "dead end" and asserted that he still suffered from the effects of discrimination in his previous position.

By decision dated December 14, 1995, the Office denied appellant's claim on the grounds that he had not established that he sustained an injury in the performance of duty. The Office found that being offered a less stressful job was not in the performance of duty and that there were no Equal Employment Opportunity (EEO) documents to support appellant's allegations of harassment and discrimination. The Office noted that appellant did not present evidence substantiating any new employment factors occurring after June 4, 1993.

Appellant disagreed with this decision and on January 11, 1996 requested an oral hearing before a representative of the Office's Branch of Hearings and Review, held February 4, 1997. At the hearing, appellant explained that he chose to take disability retirement in August 1996 rather than perform his new assignment as a medical clerk, that he felt the change from computer assistant to medical clerk was a "downgrade" although his grade and step were unchanged, that he felt inadequately trained to handle telephone calls and problem solving and that his movements around the Office were surreptitiously monitored from April to June 1996. Appellant alluded to a settlement of one of his EEO grievances in 1993 and that a May 1995 grievance remained unsettled.

By decision dated March 25, 1997 and finalized March 26, 1997, the Office hearing representative affirmed the Office's December 14, 1995 decision, finding that appellant had not submitted sufficient evidence establishing error or abuse regarding administrative matters such as the job change or time monitoring. The hearing representative also found that there was no evidence substantiating appellant's allegations of harassment and discrimination, or that he was required to perform duties in which he was not sufficiently knowledgeable. The hearing representative noted that the medical record referred only to appellant's general allegations of harassment and discrimination without citing specific incidents or factors and thus did not establish any of appellant's allegations as factual.

Appellant disagreed with this decision. He requested reconsideration in April 9 and July 30, 1997 letters,[3] denied by decision dated September 26, 1997 on the grounds of insufficient evidence.

Appellant again requested reconsideration in a November 7, 1997 letter. He enclosed copies of his electronic mail messages to Ms. Almon regarding processing a bill on September 12, 1995, being accused of not forwarding telephone calls on January 11, 1996 and a coworker becoming "bossy" on April 5, 1996. Appellant also enclosed a July 26, 1996 message from Sharon Hernandez, a staff assistant, regarding appellant's release to the records preparation

[3] Appellant indicated that he enclosed additional evidence with the letters, but such evidence was not associated with the record prior to issuance of the September 26, 1997 decision.

clerk team as of August 5, 1996, with duties of making charts for walk-in patients, filing and records assemblage.

By decision dated December 18, 1997, the Office denied appellant's request for a merit review on the grounds that the evidence submitted did not raise substantive legal questions or include new, relevant evidence. The Office found that appellant's April 9 and July 30, 1997 letters requesting reconsideration and the e-mail messages, did not establish or corroborate appellant's allegations of the employing establishment's error or abuse.

Regarding the first issue, the Board finds that appellant has not established that he sustained an emotional condition in the performance of duty as alleged.

When an employee experiences an emotional reaction to his or her regular or specially assigned work duties or to a requirement imposed by the employment, or has fear and anxiety regarding his or her ability to carry out his or her duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment and comes within the scope of coverage of the Federal Employees' Compensation Act. On the other hand, where the disability results from an employee's emotional reaction to employment matters but such matters are not related to the employee's regular or specially assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the scope of coverage of the Act.[4] Disabling conditions resulting from an employee's feeling of job insecurity, such as fear of a reduction-in-force, or the desire for a different job do not constitute personal injury sustained in the performance of duty within the meaning of the Act.[5]

When working conditions are alleged as factors in causing disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician, when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[6] When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.[7]

In the present case, the Office made specific findings on each of the factors appellant implicated.

[4] *Lillian Cutler*, 28 ECAB 125 (1976).

[5] *Raymond S. Cordova*, 32 ECAB 1005 (1981).

[6] *See Barbara Bush*, 38 ECAB 710 (1987).

[7] *Ruthie M. Evans*, 41 ECAB 416 (1990).

Appellant alleged a pattern of harassment from the employing establishment. However, in order to establish compensability under the Act, there must be evidence that harassment did in fact occur. The Board notes that unfounded perceptions of harassment do not constitute an employment factor and that mere perceptions are not compensable under the Act.[8] In the present case, appellant has not submitted sufficient evidence to support the alleged incidents of harassment. Accordingly, the Board finds that appellant has failed to substantiate his claims of harassment.

Regarding appellant's allegations that he was discriminated against due to his race or national origin, or that his movements in the office were monitored from April to June 1996, appellant failed to submit corroborating evidence. The Board has considered the lack of corroboration and concluded that appellant has submitted insufficient evidence to sustain his allegations.[9]

Regarding appellant's allegation that he was falsely accused of not forwarding telephone calls in January 1996, the Board has held that performance discussions are administrative functions of the employer and not the duties of the employee.[10] However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[11] Appellant has not submitted sufficient evidence in corroboration of his claim to establish that the employing esatablishment erred or acted abusively with regard to the performance discussion and thus has not established a factor of employment.[12] Also, the Board has held that reactions to assessments of performance, absent error or abuse by the employing establishment, are not covered by the Act.[13]

Appellant also alleged that the May 1995 job offer and August 1996 transfer from computer assistant to medical records clerk constituted a demotion. However, appellant himself stated that his grade and step were unchanged and that he voluntarily chose to take disability retirement in August 1996 rather than perform his new assignment as a medical clerk. In an August 18, 1995 statement, Ms. Almon, appellant's supervisor, also stated that the offered position of records preparation clerk was at the same grade and pay levels as his computer assistant position, but that appellant refused alleging it was a "dead end" position. Appellant has thus failed to establish that the transfer to records clerk constituted a demotion. Also, regarding appellant's fear of being in a "dead end" job, the Board has held that such feelings of job

[8] *Kathleen D. Walker*, 42 ECAB 603 (1991).

[9] *See Lorraine E. Schroeder*, 44 ECAB 323 (1992); *Mary N. Kolis*, 25 ECAB 53 (1973).

[10] *Id.*

[11] *See Richard Dube*, 42 ECAB 916 (1991).

[12] *See Frederick D. Richardson*, 45 ECAB 454 (1994).

[13] *Michael Thomas Plante*, 44 ECAB 510 (1993); *Effie O. Morris*, 44 ECAB 470 (1993).

insecurity, or desire for a different job, are not compensable factors of employment under the Act and are self-generated perceptions.[14]

Although appellant alleged that he suffered an emotional condition due to harassment and discrimination at work, he failed to provide reliable, probative and substantial evidence that such harassment did, in fact, occur. Therefore, he failed to meet his burden of proof to establish that he sustained an emotional condition in the performance of duty. As appellant predicated his claim of hypertension on a work-related stress condition, he has also failed to establish that this condition was related to factors of his federal employment.[15]

Regarding the second issue, the Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for a merit review.

To require the Office to open a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of the claim by written request to the Office identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by showing that the Office erroneously applied or interpreted a point of law, or advancing a point of law or fact not previously considered by the Office, or by submitting relevant, pertinent evidence not previously considered by the Office.[16] Section 10.328(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of these three requirements will be denied by the Office without review of the merits of the claim.[17]

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[14] *Raymond S. Cordova*, *supra* note 5; *Lillian Cutler*, *supra* note 4.

[15] Appellant also submitted medical evidence. Dr. Farrell, an employing establishment physician, submitted March 15, 16 and May 15, 1995 notes regarding appellant's feelings of stress at work and hypertension. He noted a 1992 discrimination complaint and unspecified conflicts with coworkers. Dr. Alfonso Carreno, an attending psychiatrist, submitted a July 26, 1995 report, relating appellant's account of discrimination and harassment at work since 1993 and that he was forced to accept a demotion. He noted symptoms of hyperventilation, agitation, insomnia, weakness, fatigue, dysphoria and suspicious paranoia. Dr. Carreno diagnosed an anxiety disorder and hypertension, with "severe stressors" predominantly job related. He submitted periodic notes diagnosing anxiety and depression and holding appellant off work indefinitely. Dr. Jose A. Villaplana, an attending internist, September 25, 1995 report, diagnosing hypertension "secondary to stressful situation at work," and anxiety. He released appellant to work as of October 16, 1995. In an August 6, 1996 report, Dr. Villaplana noted treating appellant on August 7, 1992 and June 16, 1993 for "work-related problems that were affecting his health." He noted that appellant's blood pressure normalized after a vacation. Dr. Villaplana diagnosed essential hypertension, noting that work affected his "blood pressure control," as he felt "unhappy and threatened by his peers/supervisors." Dr. Villaplana commented that appellant seemed somewhat paranoid. None of the physicians mentioned a specific factor of appellant's employment alleged to have caused or contributed to a medical condition. The reports are, therefore, insufficient to corroborate or substantiate appellant's allegations of harassment or discrimination. As appellant failed to establish a compensable factor of employment, the medical record need not be addressed. *Margaret S. Krzycki*, 43 ECAB 384 (1992).

[16] 20 C.F.R. § 10.138(b)(1).

[17] 20 C.F.R. § 10.138(b)(2).

Appellant's April 9 and July 30, 1997 letters did not contain new, relevant evidence on the critical issue of whether appellant had established a compensable factor of employment. The Office, therefore, properly denied these requests in its September 26, 1997 decision. Appellant in his November 7, 1997 letter requesting reconsideration enclosed copies of electronic mail messages to Ms. Almon and a July 26, 1996 message from a staff assistant, regarding appellant's release to the records preparation clerk team as of August 5, 1996. However, as the Office properly found in its December 18, 1997 decision, the November 7, 1997 letter and enclosed electronic mail messages did not raise substantive legal questions, include new, relevant evidence, or corroborate appellant's allegations of employing establishment error or abuse. Thus, the Office properly denied appellant's April 9, June 30 and November 7, 1997 requests for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated December 18 and September 26, 1997 and dated March 25, 1997 and finalized March 26, 1997 are hereby affirmed.

Dated, Washington, D.C.
December 7, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member